INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

AUTHORITIES CITED

Bachman Machine Company v. *N.L.R.B.*, 266 F.2d 599, 605 (8th Cir. 1959) 7, 8

Carpet Layers Local 419 v. *N.L.R.B.*, 429 F.2d 747, 752 (D. C. Cir. 1970) 6

Carpet Layers Local 419 v. *N.L.R.B.*, No. 71-1320, D. C. Cir., decided July 28, 1972, Sl. Op. at pp. 8-9, 80 LRRM 3254 at 3257 and cases cited 6

J. G. Roy & Sons v. *N.L.R.B.*, 251 F.2d 771, 774 (1st Cir. 1958) 8

Local 761, Electrical Workers v. *N.L.R.B.*, 366 U.S. 667, 677 (1961) 7

Local No. 24, International Brotherhood of Teamsters v. *N.L.R.B.*, 266 F.2d 675 (D. C. Cir. 1959) 6

Los Angeles Newspaper Guild v. *N.L.R.B.*, 443 F.2d 1173 (9th Cir. 1971) enfcing. *per curiam*, 185 NLRB No. 25 8

N.L.R.B. v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) 9

Page

N.L.R.B. v. *General Teamsters Local 126*, 435 F.2d 288, 291 (7th Cir. 1970) 6

National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company), 87 NLRB 54 (1949) .. 7

National Woodwork Mfrg. Ass'n. v. *N.L.R.B.*, 386 U.S. 612, 625 (1967) 7

Television & Radio Artists v. *N.L.R.B.*, 80 LRRM 2001 (D. C. Cir. 1971) 8

Truck Drivers & Helpers Local Union No. 728 v. *Empire State Express*, 293 F.2d 414 (5th Cir. 1961), cert. den., 368 U.S. 931 6,7

Vulcan Materials Co. v. *United Steelworkers of America*, 430 F.2d 446, 543 (5th Cir. 1970), cert. den., 401 U.S. 963 (1971) 6,7

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2

MISCELLANEOUS:

93 Cong. Rec. 4198 7

93 Cong. Rec. 8709 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP.,
Petitioners,

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 28a-40a) is reported at 460 F.2d 1. The decision and order of the National Labor Relations Board (Pet. App. 1a-27a) are reported at 189 NLRB No. 93.

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[1] The abbreviation "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1972 (Pet. App., p. 41a). By order dated August 4, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the relationship between the struck employer and other related companies, all of whom were part of a centrally controlled and interdependent business enterprise, warranted the holding by the court below that the related companies were not "neutrals" in the employer's dispute with the picketing union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 42a of the appendix to the petition.

STATEMENT

On February 20, 1970, Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (herein referred to as the "Union") protested the discharge by Sid Harvey Supply, Inc. (herein referred to as "Supply") of one of the Union's supporters. When the president of Supply refused to reinstate the employee, the Union instituted picketing not only at Supply, but at four other corporate members of the Sid Harvey business complex; Sid Harvey, Inc. (herein referred

to as "Inc."), Sid Harvey Suffolk, Inc. (herein referred to as "Suffolk"), Sid Harvey Nassau, Inc. (herein referred to as "Nassau"), and Sid Harvey Brooklyn (herein referred to as "Brooklyn"). It was undisputed that Stephen Harvey, who was the president of Inc., controlled the stock ownership of all five of the involved companies, was a corporate officer of each, and had the authority to order the reinstatement of the discharged employee. (A.[2] 272-273, 244-245, 389-390).

The Sid Harvey complex is a group of companies engaged in the common enterprise of the manufacturing, distributing and retail selling of rebuilt parts for heating systems. Inc. manufactures the products at its plant in Valley Stream, New York; Supply distributes these parts from its warehouse eight miles away to the twenty (20) Sid Harvey retail sales companies across the United States. Although the Sid Harvey sales companies market products of other manufacturers, some of which they obtain directly from the manufacturers, they receive Sid Harvey products only from Supply, and Supply sells only to the Sid Harvey sales companies. Supply also distributes to the sales companies some of the products made by other manufacturers. Characteristically, each of the sales companies involved here operate two to three stores and employ nine to eleven employees.

There is a significant degree of active centralized control as well as overlapping management within the Sid Harvey complex. As the dominant stockholder, officer and director, Stephen Harvey actively controls

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[2] The abbreviation "A." refers to Appendix printed for the court below.

the appointments and tenure of the corporate officers and the financial aspects of all companies in the chain. The Sid Harvey enterprise is directed from Inc.'s offices in Valley Stream where several officials of Inc. exercise active supervision and coordination of various phases of the activities of the sales companies and of Supply. Both at an annual meeting of the executives in the Sid Harvey system, and on a daily basis the officers of the various companies coordinate activities and give each other mutual assistance. The court below summarized the relationship between the Sid Harvey companies as follows (Pet. App. 37a):

> "The Sid Harvey organization is essentially an integrated complex which manufactures, distributes, and sells a limited number of products. Ownership and control of the five corporations is centralized or overlapping. The daily contact among the corporations is extensive, and the operation and success of each is interrelated with and heavily dependent upon the other members of the group performing their assigned tasks."

The extent of daily cooperation among the Sid Harvey companies was exemplified by the reaction to the picketing at Supply. For example, on the instructions of an officer of Supply, the President of Suffolk, one of the sales companies, accepted deliveries diverted from Supply on several occasions during the strike (A. 259-262, 268-273, 254-255). Moreover, as is apparent, each of the Sid Harvey companies had a vital interest in the labor dispute at Supply, which might disrupt the distribution of Sid Harvey products.

In the proceedings below, petitioners filed charges with the National Labor Relations Board (herein referred to as "the Board"). Initially the Board's Regional Director dismissed the charges on the grounds

that Supply and Inc. were "allied companies in that both are commonly owned and controlled and are both engaged 'in a straight-line operation.' " (A. 538-539). Thereafter, the Regional Director was reversed and a complaint issued. The Board adopted without discussion the view of the Trial Examiner that the Sid Harvey companies were neutrals in the dispute with Supply because there was not a sufficient degree of "integration of management and day to day operations". It therefore held that by picketing the other Sid Harvey companies the Union had engaged in an unlawful secondary boycott (Pet. App., pp. 1a-27a).

Upon review of the Trial Examiner's decision as affirmed by the Board, the court of appeals found that the Board's reliance on the absence of day-to-day control over the subsidiary companies was too myopic and mechanical as a test for determining the issue of neutrality. It held that the Board erred in ignoring the economic interdependence of the companies, the dominance of Stephen Harvey's control, and the centralized control and overlapping management that existed with respect to the companies involved. Accordingly, the three judge panel denied enforcement of the Board's order and granted respondent's petition to vacate the order. No petition for rehearing *en banc* was filed either by the petitioner or by the Board. Neither did the Board petition this Court for certiorari.

ARGUMENT

The decision of the court below is correct and does not conflict with the decision of any other court of appeals.

1. The court below followed the well recognized principle that in determining the claimed neutrality of any employer in a labor dispute, the court must examine

the "essence of the relationship" with the primary disputant, "and not its incidental trappings." *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446, 543 (5th Cir. 1970), cert. den., 401 U.S. 963 (1971). Accord: *Carpet Layers Local 419* v. *N.L.R.B.,* No. 71-1320, D. C. Cir., decided July 28, 1972, sl. op. at pp. 8-9, 80 LRRM 3254 at 3257 and cases cited. (Pet. App. 36a). The courts of appeals repeatedly have held that relevant to this inquiry are such factors as common ownership, common control through domination of one employer by another, overlapping of managment functions, operational integration, and the interdependence of the companies on each other for their economic well being. *Vulcan Materials Co.* v. *United Steelworkers of America, supra; Truck Drivers & Helpers Local Union No. 728* v. *Empire State Express,* 293 F.2d 414 (5th Cir. 1961), cert. den., 368 U.S. 931; *Local No. 24, International Brotherhood of Teamsters* v. *N.L.R.B.,* 266 F.2d 675 (D. C. Cir. 1959); *Carpet Layers Local 419* v. *N.L.R.B.,* 429 F.2d 747, 752 (D. C. Cir. 1970); *Carpet Layers Local 419* v. *N.L.R.B.,* No. 71-1320, D. C. Cir., decided July 28, 1972, 80 LRRM 3254, (petition of the Board enforced upon review following remand); *N.L.R.B.* v. *General Teamsters Local 126,* 435 F.2d 288, 291 (7th Cir. 1970).

In applying the foregoing principles, the court below determined that the closely coordinated and interdependent operations of the Sid Harvey companies, together with the additional foregoing factors, reflected a significant degree of active centralized control by Stephen Harvey and by the hierarchy of intercorporate executives. Also, the court found of particular relevance that the Sid Harvey organization was a vertically integrated system in which the component companies were dependent upon each other for their

mutual economic success, a factor long recognized as significant in determining the lack of neutrality. *Truck Drivers & Helpers, Local Union No. 728* v. *Empire State Express, supra; National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company)*, 87 NLRB 54 (1949); See, *Bachman Machine Company* v. *N.L.R.B.*, 266 F.2d 599, 605 (8th Cir. 1959). Moreover, in declining to accord controlling weight to the Board's "day-to-day" operational control test, the court was following this Court's admonition against mechanical reliance upon verbal formulae at the expense of sound legal analysis. *National Woodwork Mfrg. Ass'n.* v. *N.L.R.B.*, 386 U.S. 612, 625 (1967); See also, *Local 761, Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667, 677 (1961). In short, the court relied upon established principles in finding that the Sid Harvey companies were not the "wholly unconcerned" and uninvolved employers which Congress sought to protect.[3]

2. In proposing a "common management" test as the touchstone for determining who are neutral employers (Pet. pp. 6-9), the petitioner finds support

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[3] *Vulcan Materials Co.* v. *United Steel Workers of America, supra*, 430 F.2d at 451. The remarks of Senator Taft concerning the scope of the Act's secondary boycott provisions are apt:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees . . ." 93 Cong. Rec. 4198.
>
> * * *
>
> "The secondary boycott ban is merely intended to prevent a union from injuring a third person, who is *not involved in any way in the dispute* or strike . . . It is not intended to apply to a case where the third person is, in effect, in cahoots with or *acting as part of the primary employer.*" (Emphasis supplied.) 93 Cong. Rec. 8709.

neither in the cases it has cited nor in reason. Although assuredly the courts in the cited cases looked to common management or the lack of it as a factor, none have ever suggested that it is, or ought to be, the sole consideration. See e.g., *J. G. Roy & Sons* v. *N.L.R.B.*, 251 F.2d 771, 774 (1st Cir. 1958); *Bachman Machine Co.* v. *N.L.R.B.*, 266 F.2d 599, 605 (8th Cir. 1959). In both of the foregoing cases the court mentioned the absence of integrated operations as an additional consideration in determining the neutrality of commonly owned companies. (In accord are the cases cited in section 1 above.) Exclusive reliance on such a factor would be a reversion to primative formalism. For, in many instances a manager or managerial group lacks the authority to direct the most significant affairs of the business or has only partial control thereof. Indeed, as in this case, active control over significant aspects of the business may lie with the executive hierarchy of a parent corporation. Accordingly, there is no warrant for the Court to consider for a review a doctrine which is without merit and which is so plainly at odds with the established law.

3. Contrary to the contention of the petitioner (Pet. pp. 7-8), the decision below in no way conflicts with *Television & Radio Artists* v. *N.L.R.B.*, 80 LRRM 2001 (D.C. Cir. 1971) or *Los Angeles Newspaper Guild* v. *N.L.R.B.*, 443 F.2d 1173 (9th Cir. 1971) enf'cing. *per curiam*, 185 NLRB No. 25. Both of those cases concerned separate autonomous divisions of the Hearst Corporation, a conglomerate composed of numerous divisions engaged in diverse enterprises ranging from television broadcasting to newspaper publication to cattle ranching. In both cases, the court found that each of the autonomous divisions involved were sepa-

rately controlled as if they were independent businesses, establishing their own policies and in one case even competing with each other. Looking to the substance of the relationships, rather than the legalistic form, in each case the court held that even though part of the same corporation, the separate divisions were so divorced from each other as to be neutrals in the labor disputes of the others. Nothing in the facts, the holding or the opinion below undermines either of these decisions.

4. Moreover, because the decision below turned on its peculiar facts involving a conjunction of interdependent operations and significant centralized control, it has none of the far reaching significance for conglomerates that the Chamber of Commerce suggests in its *amicus curiae* brief (p. 6, n. 11).

5. Finally, there exists no inconsistency between the decision below and *Denver Building and Trades Council*[4] as the Chamber contends. There was no hint here, that the neutrality of any party would have been impaired had the court been dealing with the kind of arms-length independent contractors whose relationship was at issue in that case. Rather, the very factors considered to be critical by the court below, such as common ownership, active centralized control, and economic interdependence (as opposed to the contractual interrelations of the construction contractors in *Denver Trades*) demonstrates the fidelity of the court to the principles announced in *Denver Trades* and other decisions of this Court.

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[4] *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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